

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

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FAMILY COURT DIV.

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HENNEPIN CO. DISTRICT  
COURT ADMINISTRATION

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

Bradley A. Hoyt  
and Continental Property Group, Inc.,

Plaintiffs,

v.

City of Minneapolis,

Defendant.

**ORDER**

Case File No. 27-CV-07-5826

The above-entitled matter came on before the Honorable Stephen C. Aldrich on December 21-23, 2009 for the second phase of a bifurcated court trial to address the issue of damages.

Plaintiffs Bradley A. Hoyt and Continental Property Group, Inc. ("Plaintiff") were represented by William R. Skolnick and LuAnn M. Petricka. Defendant City of Minneapolis ("Defendant") was represented by Charles N. Nauen and Gregory J. Myers.

Based upon the evidence adduced, the argument of counsel, and all of the files, records, and proceedings herein, and for the reasons stated on the record, the Court makes the following:

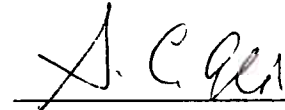
**ORDER:**

1. Plaintiff is awarded \$165,369.88 in compensatory damages for out-of-pocket expenses.
2. Plaintiff is awarded \$357,523.45 in attorneys' fees and costs.
3. The attached Memorandum is incorporated herein and made a part hereof.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: April 29, 2009

A handwritten signature in black ink, appearing to read "S. C. Aldrich", is written over a horizontal line.

Stephen C. Aldrich  
Judge of District Court

## **MEMORANDUM**

### **I. Procedural Background**

In the fall of 2003, Plaintiff purchased an option on property located in the Loring Hill neighborhood of Minneapolis. Plaintiff purchased its option with the intention of developing the property.

After conducting initial research of the project site with the assistance of its architects and taking a variety of factors into consideration, including economic viability, Plaintiff eventually settled on a design for its project consisting of a twenty-one story tower.

Because the contemplated tower project exceeded height, setback, and capacity restrictions of the applicable zoning districts, in July of 2004, Plaintiff applied for two conditional use permits (“CUPs”), two variances, and a site plan review.

In August of 2004, Community Planning and Economic Development (“CPED”) staff reviewed Plaintiff’s application and issued a fourteen-page report recommending that the City of Minneapolis Planning Commission (“Planning Commission”) deny the application. Later that month, acting on the recommendation of CPED, the Planning Commission denied Plaintiff’s application by votes of five to two on the CUPs, five to two on the variances, and six to one on the site plan.

In September 2004, Plaintiff appealed the Planning Commission’s decision to the City Council. On September 15, 2004, the Planning Commission’s decision was reviewed by the Council’s Zoning and Planning Committee. The Committee took testimony from CPED staff and representatives of Plaintiff before ultimately recommending the denial of Plaintiff’s application by a unanimous five votes.

On September 24, 2004, by a unanimous thirteen votes, the full City Council adopted the findings and recommendation of the Zoning and Planning Committee and upheld the decision of the Planning Commission to deny the requested CUPs, variances, and site plan review.

On November 23, 2004, Plaintiff submitted an application for a second project on the property, consisting of a seven-story building. The second project required a CUP for height and for the number of residential units as well as a site plan review, but required no variances.

On January 23, 2005, CPED staff issued a report recommending that the Planning Commission approve the application. However, on February 23, 2005, before the Planning Commission could take action on Plaintiff's proposal, Plaintiff withdrew its application, citing infeasibility due to higher than anticipated constructions costs.

On March 27, 2007, Plaintiff filed the instant lawsuit alleging violations of procedural due process, substantive due process, and equal protection, seeking declaratory and injunctive relief, an award of damages, and attorneys' fees under 42 U.S.C. §1983.

The parties appeared before the Court on August 1, 2008, on Defendant's motion for summary judgment. By order of October 10, 2008, the Court granted Defendant's motion as to Plaintiff's equal protection claim, but denied the motion as to Plaintiff's due process claims. Thus, the matter proceeded to trial under Minn. Stat. §462.361 in order to supplement the record of the City Council proceedings and to allow Plaintiff an opportunity to challenge the reasonableness of the City's decision and the fairness of the process afforded.

On November 6, 2008, Defendant sought to have the case removed to Federal Court. Defendant argued that this Court's summary judgment decision modified Plaintiff's original complaint and, therefore, removal was appropriate under the doctrine of revival. The Federal

Court disagreed, however, and granted Plaintiff's motion to remand the case to this Court on February 12, 2009.

On April 27, 2009, the Court heard Defendant's request for leave to file a motion for reconsideration. Defendant argued that Plaintiff, in its application, failed to make a showing of hardship that would warrant the grant of a variance. On May 21, 2009, the Court issued an order finding that Plaintiff did not make a showing of hardship in its application, but allowing Plaintiff to argue, at trial, that there was an additional equal protection violation with regard to the treatment of its application compared to others, namely, that the City routinely ignored the hardship requirement.

The matter subsequently came on for a court trial commencing June 8, 2009, and testimony continued periodically thereafter until June 23, 2009. Two days of closing arguments were held on August 3-4, 2009.

On July 17, 2009, following the close of Plaintiff's case-in-chief, the Court heard Defendant's motion for involuntary dismissal of all of Plaintiff's claims. On July 22, 2009, the Court denied Defendant's motion and further ruled that, while Plaintiff did not specifically state a claim for violation of procedural due process in its original complaint, the complaint was amended under rule 15.02 based upon the evidence presented by both parties at trial.

On September 16, 2009 the Court issued its Findings of Fact, Conclusions of Law, and Order on the issue of liability. The Court dismissed Plaintiff's equal protection and substantive due process claims, but held that Defendant had violated Plaintiff's procedural due process rights and denied Plaintiff a fair hearing on its proposed project, specifically that:

[Council member] Goodman took a position in opposition and exhibited a closed mind with regard to Plaintiff's proposed project prior to hearing Plaintiff's appeal at the September 15, 2004 Zoning and Planning Committee meeting and the September 24, 2004 meeting of the full City Council. The timeline of events and

communications further demonstrate that Goodman adopted an advocacy role in opposition to Plaintiff's proposed project well before she discharged her quasi-judicial duties. She was clearly involved in an effort not only to assist to organize and mobilize neighborhood opposition to the project, but also to sway the opinions of her fellow council members. Such actions were improper and impermissible for someone acting in a quasi-judicial capacity. Furthermore, trial testimony (most notably that of then-Council President Johnson) established that, while aldermanic courtesy is not determinative of zoning decisions, the opinion of the council member in whose ward a project is proposed is given substantial weight.

Goodman's actions, coupled with the lingering effects of aldermanic courtesy and the reliance, on the part of the City Council in general, on undisclosed communications and evidence not made a part of the official record vitiated Plaintiff's right to a fair hearing and violated its right to procedural due process.

Because the Defendant was found liable for a violation of procedural due process, a second phase of trial was necessary in order to take evidence on the issue of damages.

The damages phase of trial was conducted on December 21-22, 2009, with closing arguments heard on December 23, 2009. In addition to the documentary evidence presented, the Court heard testimony from two witnesses. Plaintiff and real estate developer Bradley Hoyt testified for Plaintiff. Real estate appraiser Robert Strachota testified on behalf of Defendant.

Plaintiff seeks an award of three distinguishable categories of damages, specifically: lost profits, out-of-pocket expenses, and attorneys' fees and costs.

## **II. Lost Profits**

Plaintiff first seeks an award of compensatory damages in the amount of \$11,663,600. This figure represents the profits that Plaintiff claims it would have realized had its project been approved and built.

The U.S. Supreme Court instructs that, in the context of a procedural due process claim, "substantial damages should be awarded to compensate only those actual injuries caused by procedural irregularities, pursuant to ordinary tort principles." *Carey v. Piphus*, 435 U.S. 247,

264 (1978). “Accordingly, when §1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principals derived from the common law of torts.” *Memphis Comm. Scho. Dist. v. Strachura*, 477 U.S. 299, 307-308 (1986).b

A bedrock principal of the common law of torts is that damages which are remote and speculative cannot be recovered. *See Hornblower & Weeks-Hemphill Noyes v. Lazere*, 222 N.W.2d 799 (1974). There is no general test of remote and speculative damages, and such matters should usually be left to the judgment of the trial court. *Austin v. Rosecke*, 61 N.W.2d 240 (1953).

Here, Plaintiff’s estimates of revenue, costs, and profit are highly conjectural and are the product of optimistic speculation. Plaintiff’s profit projections hinge upon the accuracy of each of its sanguine construction and market assumptions. However, given the benefit of hindsight, it is clear that Plaintiff would have been operating in a market with a dangerously narrow margin for error. Any inaccuracy in Plaintiff’s assumptions would have had a dramatic impact on the bottom line actually realized.

Plaintiff’s testimony was based solely on its own informal estimates and was wholly unsupported by contemporaneous documentation. Plaintiff conducted no feasibility analysis, had no agreement with a contractor, no lending commitment or other formal plan for financing, no excavation or building permits, no final building plans, no pre-sales, and no marketing plan.

Mr. Strachota’s testimony, on the other hand, suggested that Plaintiff would have lost upwards of \$10 to \$20 million had it pursued its project during the timeframe in question. This testimony was based upon more realistic assumptions and was supported by the actual experiences of other projects under development during the timeframe. Given this foundation,

Mr. Strachota's testimony is more credible and underscores the fragile nature of Plaintiff's profit projections.

In short, Plaintiff's claim of \$11,663,600 in lost profits is simply too speculative to form the basis of an award of damages.<sup>1</sup>

### **III. Out-of-Pocket Expenses**

Next, Plaintiff argues that it is entitled to an award of compensatory damages for the out-of-pocket expenses it incurred in connection with its proposed project which were ultimately rendered worthless by Defendant's violation of procedural due process. Plaintiff claims that it paid \$3,548.21 in application fees, \$150,000.00 in architectural fees, \$11,821.67 in attorneys' fees, and \$9,574.00 for soil testing work, for a total of \$174,943.88.

As Plaintiff's claim of damages for out-of-pocket expenses are compensatory in nature, the Court is once again guided by the principles explicated above. Specifically that, "substantial damages should be awarded to compensate only those actual injuries caused by the procedural irregularities, pursuant to ordinary tort principles." *Carey v. Piphus*, 435 U.S. 247, 264 (1978).

Defendant argues that the procedural violations that occurred in this case did not *cause* Plaintiff's out-of-pocket loss, because, as the Court held in its September 16, 2009 Order, Defendant had a reasonable basis for denying Plaintiff's application. As such, Defendant argues

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<sup>1</sup> Also telling in this regard, are Plaintiff's own contemporaneous actions. First, Plaintiff exercised its option to purchase the property shortly after Defendant denied its application for the tower project, indicating that it still viewed the property as a profitable investment. Second, only a few months after the tower project was denied, and at a time when information regarding a potential downturn in the condo market was intensifying, Plaintiff withdrew a second proposal for a seven-story project on the same site, citing economic infeasibility due to higher-than-expected construction costs. Plaintiff failed to explain, at trial, why one project would have been profitable while another smaller project, constructed during the very same timeframe, admittedly would not have been.

that Plaintiff's application would have been denied *even in the absence of* the procedural violations.<sup>2</sup>

However, Defendant's violations of procedural due process did, indeed, cause Plaintiff's out-of-pocket damages. They did so, because they altered the nature of those expenses. Had Plaintiff received a fair hearing on his application, the out-of-pocket expenses incurred in furtherance of its development and application would have purchased exactly what they were intended to, an opportunity for approval. By denying Plaintiff a fair hearing on its application, Defendant denied Plaintiff this opportunity and rendered Plaintiff's out-of-pocket expenses worthless. Plaintiff clearly would not have expended the resources it did in furtherance of its development and application had it known that it would be denied a fair hearing and any opportunity for approval.

Put another way, Plaintiff could not have reasonably expected that its application would be approved. If Plaintiff incurred out-of-pocket expenses in furtherance of its development and application, and that application was denied following a fair hearing, no compensable damages would lie. In such a case, denial of the application is a risk of which Plaintiff ought to have been aware and one which it alone assumed.

Plaintiff could, however, reasonably expect that its application would be given a fair hearing and an opportunity for approval. In this case, that expectation proved to be mistaken. The risk of such a mistaken expectation is different in kind than the risk of denial. It is a risk of which

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<sup>2</sup> Defendant also argues that "[d]amages are not available in most cases where a landowner alleges that a permit or approval has been improperly denied, because no injury has occurred. Edward H. Ziegler, *Rathkopf's the Law of Zoning and Planning*, §66.47, n.5 (2009). While damages may not be the typical remedy, there is nothing in the case law to suggest that a city should be exempt from paying compensatory damages where liability and causation are proven.

Plaintiff had no reason to be aware and one which it should not be forced to assume. Any loss occasioned by such a risk should not be borne by Plaintiff, but rather by Defendant, whose conduct precipitated the denial of due process and rendered Plaintiff's out-of-pocket expenses worthless.<sup>3</sup>

Therefore, Plaintiff is entitled to an award of damages for the out-of-pocket expenses incurred in relation to the twenty-one story tower project. The Court, however, restricts these damages to only those which were actually rendered worthless. Any expenses which were, or could be, transferred to a subsequent project shall be denied. Therefore, Plaintiff is awarded its application fee in the amount of \$3,548.21, architectural fees in the amount of \$150,000.00, and attorney's fees in the amount of \$11,821.67 all of which were incurred in connection with the twenty-one story tower project for a total of \$165,369.88. The Court declines to award Plaintiff \$9,574.00 paid for soil testing work, as this work is likely transferable to subsequent projects.

#### **IV. Attorneys' Fees and Costs**

Finally, Plaintiff seeks an award of attorneys' fees and costs incurred in pursuing its claim of procedural due process violations pursuant to 42 U.S.C. § 1988. Plaintiff submitted an attorney fee affidavit and requests an award of attorneys' fees and costs in the amount of \$522,930.08.

Defendant specifically objects to the inclusion of amounts relating to electronic research and argues generally that Plaintiff's award of attorneys' fees should be discounted by at least two-thirds to reflect the fact that Plaintiff prevailed on only one of its three claims.

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<sup>3</sup> Moreover, while the Court previously held that a reasonable basis for denial existed, it also held that Plaintiff's right to a fair hearing was vitiated. It is impossible to say with any certainty what decision the City Council may have reached in the absence of procedural violations. As such, it is impossible to say with any certainty that the procedural violations did not cause the denial of Defendant's application.

However, “[t]he amount of fees to be awarded must be determined on the unique facts of each case.” *Hensley v. Eckherhart*, 461 U.S. 424 (1982). The Court in *Hensley* rejected the use of “a mathematical approach comparing the total number of issues in the case with those actually prevailed upon.” *Id.* At 435. Instead, the Court recognized that in some cases,

[...] The prevailing plaintiff’s claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel’s time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead, the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation.

*Id.* At 425. The Court in *Hensley* stated that there is no precise rule or formula for the court to follow in exercising its discretion in making its attorneys’ fee determinations. However, the Court must consider the following factors: 1) the relative importance of various issues; 2) the interrelation of the issues; 3) the difficulty in identifying issues; and 4) the extent to which a party prevails on certain issues. *Id.* At 428.

Here, Plaintiff brought three basic claims alleging violations of procedural due process, substantive due process, and equal protection. These claims were highly interrelated and there was considerable overlap in their operative facts. While Plaintiff prevailed only on the procedural due process claim, it was clear early on in the litigation that this claim was the focus of Plaintiff’s case. The bulk of the discovery had, the allegations made, and the evidence presented centered on the improper conduct of City Council members.

Furthermore, Defendant’s litigation tactics contributed significantly to Plaintiff’s overall attorneys’ fees. Plaintiff was forced to defend against three dispositive motions, an attempted removal to federal court, and considerable delay with regard to electronic discovery. While Defendant was entitled to pursue the first two courses of action, their decision to do so added

significantly to the cost of the litigation. As for the electronic discovery, the Court, on the record, previously indicated that it would award Plaintiff \$14,597.00 that was paid to Kroll OnTrack to recover data, which proved to be crucial to the case, from Defendant's computers. This amount will be added to Plaintiff's attorneys' fee award.

Nevertheless, Plaintiff's attorneys' fee award must be discounted to a certain degree. First, Defendant is correct that "computer-aided research, like any other form of legal research, is a component of attorneys' fees and cannot be independently taxed as an item of cost." *Ryther v. KARE 11*, 864 F.Supp. 1525, 1534 (D. Minn. 1994). Therefore, \$8,025.50 related to electronic research that Plaintiff claims as a cost item will be disallowed.

Second, Plaintiff was unsuccessful in its pursuit of substantive due process and equal protection claims and pursued those claims long after the Court expressed considerable skepticism regarding their merits. However, the straightforward mathematical approach suggested by Defendant, discounting Plaintiff's attorneys' fees award by two-thirds to reflect the fact that it failed to prevail on two of its three claims, would be inappropriate. Instead, in light of the importance of Plaintiff's procedural due process claim and the central role it played in the litigation, combined with the additional fees necessitated by Defendant's trial tactics, this Court finds that an award of two-thirds of Plaintiff's attorneys' fees and costs is appropriate. As such Plaintiff is awarded \$357,523.45 for its attorneys' fees and costs.<sup>4</sup>

BY THE COURT:



Stephen C. Aldrich  
Judge of District Court

Dated: April 29, 2010

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<sup>4</sup>  $((\$522,930.08 - \$8,025.50) (2/3)) + \$14,597.00 = \$357,523.45$